STATE OF MICHIGAN

COURT OF APPEALS

JEFF HOBBS,

Plaintiff-Appellant,

v

SHINGOBEE BUILDERS, INC., JOHN E. GREEN COMPANY, and UNIVERSITY OF MICHIGAN aka KELLOGG EYE CENTER,

Defendants-Appellees,

and

CLARK CONSTRUCTION COMPANY, INC., and GILBANE/CLARK JOINT VENTURE,

Defendant/Third-Party Plaintiff-Appellee-Cross-Appellee,

and

STATE AUTO INSURANCE COMPANY,

Third-Party Defendant-Appellee-Cross-Appellant,

and

TREND MILLWORK, INC, and TREND MILLWORK, LLC,

Third-Party Defendant-Cross-Appellee,

and

TREND CARPENTRY, INC., and TREND CARPENTRY, LLC,

Third-Party Defendant.

UNPUBLISHED
November 7, 2013

No. 307359
Emmet Circuit Court
LC No. 10-002508-NO

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff, Jeff Hobbs, appeals as of right the trial court's grant of summary disposition to Clark Construction Company, Inc. (Clark), Shingobee Builders, Inc. (Shingobee), John E. Green Company (Green), and Gilbane/Clark Joint Venture (Gilbane). Third-party defendant State Auto Insurance Company (State Auto) filed a cross-appeal contending that the trial court erred in finding that State Auto owed a duty to defend Clark and Gilbane.[1] We affirm.

I. FACTUAL BACKGROUND

Plaintiff, an employee of Trend Carpentry, was injured on two separate occasions in the course of his construction work. In the first incident at the Odawa Casino (Odawa Casino project), plaintiff was moving a pallet of ceiling tiles in the restaurant area when he stepped on a pile of unbound copper pipes. Plaintiff twisted his back, but was able to continue working. He alleged that Shingobee and Clark, the general contractors/construction managers, and Green, the tile/plumbing subcontractor, behaved negligently in allowing or ordering the copper pipes to be placed in a dangerous location.

The second incident occurred during a construction project at the University of Michigan, Kellogg Eye Center (U of M project), where plaintiff claims to have reaggravated his back injury. Plaintiff was descending on stairs when he slipped and fell on black ice. He alleged that Gilbane and Clark, the general contractors and/or construction managers, behaved negligently in allowing this accumulation of ice and in failing to warn him about or otherwise remedy the condition.

Defendants Clark, Shingobee, Green, and Gilbane eventually sought summary disposition pursuant to MCR 2.116(C)(10), contending that there were no genuine issues of material fact regarding plaintiff's claims. The trial court agreed with defendants, and granted their respective motions. However, acting as third-party plaintiffs, Clark and Gilbane filed third-party complaints against State Auto, the Trend Millwork entities, and the Trend Carpentry entities. Clark and Gilbane argued that, partly based on State Auto's insurance contracts with the Trend Carpentry and Trend Millwork entities, State Auto owed Gilbane and Clark a duty to defend in this lawsuit. After Clark, Gilbane, and State Auto filed respective motions for summary disposition, the trial court determined that pursuant to the insurance contracts and other contracts, State Auto owed Clark and Gilbane a duty to defend.

On appeal, plaintiff challenges the trial court's orders granting summary disposition to Shingobee, Clark, and Green for the Odawa Casino project, and to Gilbane for the U of M project. On cross-appeal, State Auto challenges the trial court's ruling that it owed Gilbane and Clark a duty to defend.

[1] While plaintiff listed University of Michigan, Kellogg Eye Center as an appellee, he does not raise any issues regarding U of M's dismissal from the lawsuit.

II. SUMMARY DISPOSITION

A. Standard of Review

A grant or denial of a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). The motion for summary disposition "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (internal quotations and citations omitted). This Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

B. Odawa Casino Project

As the Michigan Supreme Court recently clarified, "while the mere existence of a contractual promise does not ordinarily provide a basis for a duty of care to a third party in tort, the existence of a contract also does not extinguish duties of care otherwise existing." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 170; 809 NW2d 553 (2011) (quotation marks and citation omitted). Consistent with *Loweke*, plaintiff in the instant case contends that his claims are not based on contractual duties, but instead arise out of a common-law theory of active negligence relating to defendants' direction or allowance of the coppers pipes to be placed in a dangerous location.

Plaintiff first contends that even if he is unable to identify the person responsible for placing the pipes in the restaurant area, that fact alone is not dispositive. While plaintiff initially testified that he was under the impression that plumbers from Green put the copper pipes in the location of plaintiff's accident, he later acknowledged that he "had no idea how [the pipes] got there." He also admitted that he did know if anyone from Green was even working that morning. Because plaintiff admits that he does not know who placed the pipes in that location, any argument that defendants were negligent for placing the pipes in the area would be merely speculative, which is not enough to survive a motion for summary disposition. *Karbel v Comerica Bank*, 247 Mich App 90, 97-98; 635 NW2d 69 (2001).

Plaintiff, however, contends his claim for the active negligence of Shingobee and Clark was based on their direction that other trades put their materials in a dangerous location. Plaintiff argues that Shingobee and Clark knew or should have known that carpentry work needed to be done in the area. Plaintiff also claims that Green was actively negligent as it allowed the copper pipes to rest in a dangerous place, and was compliant in the direction given by Clark and Shingobee.

Plaintiff testified that Shingobee gave a general instruction for workers to move their materials in the restaurant area in an effort to clear the casino area.[2] Yet, plaintiff also testified that he did not know if the pipes were put in the restaurant area based on that direction from Clark or Shingobee. Plaintiff further admitted that he did not know if the pipes were in the restaurant area because they were being used, rather than just stored there on the request of Clark or Shingobee. Plaintiff also acknowledged that anyone could have moved the pipes from one place to another. Essentially, plaintiff failed to establish that any instruction from Clark, Shingobee, or Green was at all connected to the presence of the pipes. As plaintiff candidly admitted, he simply "had no idea how [the pipes] got there." Mere speculation and conjecture are not enough to survive a motion for summary disposition. *Karbel*, 247 Mich App at 97-98.

Therefore, while plaintiff claims that the active negligence was Clark and Shingobee's direction for trades to put materials in the restaurant area, and Green's compliance in that direction, plaintiff's testimony at the deposition demonstrates that he had no idea how the pipes came to be in that location or if they were placed there at Shingobee's or Clark's direction. Without producing any evidence that the pipes were moved based on the direction of Shingobee or Clark, plaintiff's claim for negligence was properly dismissed.

C. U of M Project

Next, plaintiff contends that the trial court erred in granting summary disposition to Gilbane regarding the icy walkway incident at the U of M project. Of initial significance is that plaintiff does not raise any arguments pertaining to Clark Construction's role in the U of M incident. The trial court entered an order on March 25, 2011, granting Clark's motion for summary disposition for the U of M incident. Plaintiff does not mention the order in his appellate brief, and only refers to Gilbane/Clark Joint Venture in his analysis of this issue.

Plaintiff contends that his negligence claim does not arise from Gilbane/Clark Joint Venture's failure to maintain the walkway, but from its "affirmative action of directing the workers at the job site to use that walkway, despite its unsafe condition." However, plaintiff testified that the walkway "was a designated route that Clark Construction had everybody take."[3] Plaintiff did not indicate that anyone from Gilbane/Clark Joint Venture told him to take the walkway. Thus, plaintiff has failed to demonstrate a genuine issue of material fact based on any direction from Gilbane that would constitute negligence.[4]

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[2] Plaintiff also suggested that Clark and Shingobee were responsible for the trades pushing their materials in the restaurant location.

[3] When later asked whether Trend instructed him to take that walkway, plaintiff again reiterated that it was "[n]ot Trend, Clark."

[4] To the extent that the trial court granted summary disposition to any of these defendants based on an erroneous reading of *Fultz v Union-Commerce Assoc*, 470 Mich 460, 462; 683 NW2d 587, 589 (2004), "we will not reverse the court's order when the right result was reached for the wrong reason." *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

III. DUTY TO DEFEND[5]

A. Standard of Review

On cross-appeal, State Auto contends the trial court erred in granting summary disposition to Clark and Gilbane based on a finding that State Auto owed them a duty to defend. We review a trial court's decision to grant a motion for summary disposition de novo. *MEEMIC Ins Co*, 292 Mich App at 280. "The construction and interpretation of insurance contracts is also a question of law that this Court reviews de novo." *Shefman v Auto-Owners Ins Co*, 262 Mich App 631, 636; 687 NW2d 300 (2004). Further, whether an insurer is obligated under the policy to defend is a question of law, which we review de novo. *America Bumper & Mfg Co v Nat'l Union Fire Ins Co*, 261 Mich App 367, 375; 683 NW2d 161 (2004).

B. Background Law

"The rules of contract interpretation apply to the interpretation of insurance contracts." *McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010). The language in an insurance contract should be read as a whole and we construe the language to give effect to every word, clause, or phrase. *Id.* "When the policy language is clear, a court must enforce the specific language of the contract. However, if an ambiguity exists, it should be construed against the insurer." *Id.* (citations omitted). Any undefined term should be given its plain and ordinary meaning, which may be gathered from dictionaries. *Id.* Although this Court will "construe the contract in favor of the insured if an ambiguity is found, this does not mean that the plain meaning of a word or phrase should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefiting an insured." *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 82; 730 NW2d 682 (2007) (quotation marks and citation omitted).

"It is well settled in Michigan that an insurer's duty to defend is broader than its duty to indemnify." *Auto-Owners Ins Co v Martin*, 284 Mich App 427, 451; 773 NW2d 29 (2009) (quotation marks and citation omitted). It also is "well settled that if the allegations of the underlying suit arguably fall within the coverage of the policy, the insurer has a duty to defend its insured." *Id.* (quotation marks and citation omitted); see also *Citizens Ins Co v Secura Ins*, 279 Mich App 69, 74; 755 NW2d 563 (2008). To determine whether an insurer has a duty to defend, this Court looks to the language of the insurance policy, and construes its terms to determine the scope of coverage in the policy. *Shefman*, 262 Mich App at 637. Further, "[t]he duty of the insurer to defend the insured depends upon the allegations in the complaint of the third party in his or her action against the insured." *Citizens Ins Co*, 279 Mich App at 74

[5] Clark argues that this Court lacks jurisdiction to decide State Auto's cross-appeal because State Auto was not a proper appellee in plaintiff's direct appeal. However, that challenge lacks merit because MCR 7.207(A)(2) allows a defendant in a civil action to file a cross-appeal regardless of whether it was properly classified as an appellee. Further, MCR 7.207(B)(1) allows a party to file its cross-appeal within 21 days after the filing of the claim of appeal, which State Auto did in this case.

(quotation marks and citation omitted). Yet, "the duty to defend is not limited to the precise language of the pleadings. Rather, it is the substance of the allegations, not their mere form, that must be examined." *State Farm Fire & Cas Co v Johnson*, 187 Mich App 264, 268; 466 NW2d 287 (1990) (citations omitted).

C. Analysis

To determine whether State Auto had a duty to defend Clark or Gilbane, the terms of State Auto's general commercial liability policy, and specifically the additional insured endorsements, must be examined.

The threshold question is whether Clark and Gilbane qualified as additional insureds under the additional insured policy endorsements that State Auto entered into with Trend Millwork and Trend Carpentry.[6] The "Additional Insured-Owners, Lessees or Contractors-Automatic Status When Required in Construction Agreement With You", CG 20 33 07 04, in relevant part, states:

> A. **Section II – Who is An Insured** is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for 'bodily injury', 'property damage' or 'personal and advertising injury' caused, in whole or in part, by:
>
> (1) Your acts or omissions; or
>
> (2) The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured.
>
> A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed.

Further, the "Additional Insured – Owners, Lessees or Contractors – Automatic Status (Including Completed Operations)," SL 20 33 04 07, in relevant part, states:

[6] At some point in 2008, the Trend entities became LLCs. On appeal, State Auto does not specifically raise any argument based on this change or the fact that some of the contracts were with Trend Millwork, Inc., and Trend Carpentry, Inc.

B. **The following is added to Section II – Who is An Insured:**

> 1. Any person or organization for whom you are performing operations when you and such person or organization have agreed in a written contract or written agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to:
>
> > a. Liability for 'bodily injury', 'property damage' or 'personal and advertising injury' caused, in whole or in part, by:
> >
> > > (1) Your acts or omissions; or
> > >
> > > (2) The acts or omissions of those acting on your behalf,
> > >
> > > in the performance of your ongoing operations for the additional insured.
> >
> > A person or organization's status as an additional insured for ongoing operations ends when your operations for that additional insured are completed.

While the wording of these two endorsements differs slightly, the relevant language is the same. Although these additional insured endorsements were part of the policy between State Auto and the Trend entities, Clark and Gilbane contend that by virtue of a series of other contracts, they were additional insureds and were entitled to have State Auto defend them.

For the Odawa Casino project, Trend Millwork entered into a contract with Clark, agreeing to perform woodwork construction services. Similarly, Trend Millwork entered into a contract with Gilbane for the U of M project and agreed to perform various services. Consistent with the additional insured endorsements policies, Trend Millwork agreed in writing to add Clark as an additional insured and to extend liability insurance to Gilbane.

Trend Millwork entered into respective purchase order agreements with Trend Carpentry during the Odawa Casino project and the U of M project. In these purchase orders, Trend Carpentry agreed to perform services for Trend Millwork. Trend Carpentry also agreed that the terms and conditions of the agreements between Trend Millwork and Gilbane, and between Trend Millwork and Clark, formed part of the respective purchase orders.

Based on these contracts, the trial court found that State Auto had a duty to defend Clark and Gilbane in the instant lawsuit. As noted above, Trend Millwork agreed in writing to extend insurance coverage to Gilbane and Clark. The additional insured endorsements further require that for coverage to apply to other organizations, Trend Millwork had to be performing operations for such organizations when it agreed to add them as additional insureds. To establish this, Clark and Gilbane highlight their respective contracts with Trend Millwork, wherein Trend Millwork agreed to perform services for Clark during the Odawa Casinos project and for Gilbane during the U of M project. Moreover, the accident happened during the ongoing operations of the Odawa Casino project and the U of M project, and bodily injury was alleged.

The language of the additional insured endorsements further requires that liability for the bodily injury be caused, at least in part, by the acts or omissions of Trend Millwork, or those acting on behalf of Trend Millwork. In the instant case, plaintiff did not file suit against Trend Millwork or Trend Carpentry. However, Clark and Gilbane argued that by virtue of the purchase orders between Trend Carpentry and Trend Millwork, plaintiff was working on behalf of Trend Millwork. Clark and Gilbane also contended that plaintiff's comparative fault caused, at least in part, his own bodily injury. The trial court agreed, and found that the possibility of plaintiff's comparative fault satisfied the language in the additional insured policy.

The plain language of the additional insured endorsements supports this interpretation. Plaintiff was an employee of Trend Carpentry, and Trend Carpentry was performing operations on behalf of Trend Millwork. Thus, the language of "acts or omissions of those acting on [Trend Millwork's] behalf" is satisfied. Moreover, plaintiff's comparative fault triggered the language of the policy because his acts or omissions caused, at least in part, liability for bodily injury that resulted in this litigation. This also is consistent with the clear purpose of the contract and the additional insured endorsement, which is to extend coverage to those that Trend Millwork is performing actions on behalf of, such as Clark and Gilbane. Also, as noted above, "if the allegations of the underlying suit *arguably* fall within the coverage of the policy, the insurer has a duty to defend its insured." *Shefman*, 262 Mich App at 636 (quotation marks and citation omitted) (emphasis added).

State Auto, however, argues that a simple assertion that plaintiff could have been comparatively negligent does not meet the evidentiary threshold set forth in MCR 2.116(G)(4). MCR 2.116(G)(4), in relevant part, states that pursuant to a motion for summary disposition under MCR 2.116(C)(10), the nonmoving party "may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." However, Clark and Gilbane produced the deposition testimony of plaintiff wherein plaintiff testified about facts that could support a finding of comparative negligence. Moreover, as noted above, it "is well settled that if the allegations of the underlying suit arguably fall within the coverage of the policy, the insurer has a duty to defend its insured." *Shefman*, 262 Mich App at 636 (quotation marks and citation omitted).[7]

Therefore, we agree with the trial court that based on the contracts cited above, State Auto had a duty to defend Clark and Gilbane in this case.

[7] State Auto also argues that the purchase order agreements between the Trend entities were entered into before the contracts with Clark or Gilbane. However, that does not preclude the application of the additional insured endorsement, which only requires someone performing operations on behalf of Trend Millwork to cause, at least in part, liability for bodily injury. As discussed above, plaintiff was working on behalf of Trend Carpentry, and Trend Carpentry was working on behalf of Trend Millwork at the time of the accident.

D. Exclusion

State Auto, however, asserts that exclusion 2(e) applied and precluded coverage. "Clear and specific exclusionary provisions must be given effect, but are strictly construed against the insurer and in favor of the insured." *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 292; 778 NW2d 275 (2009). The relevant exclusion states:

> (e) Employer's Liability
>
> 'Bodily Injury' to:
>
> (1) An 'employee' of the insured arising out of and in the course of:
>
> (a) Employment by the insured; or
>
> (b) Performing duties related to the conduct of the insured's business; . . .
>
> This exclusion applies:
>
> (1) Whether the insured may be liable as an employer or in any other capacity; and
>
> (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.
>
> This exclusion does not apply to liability assumed by the insured under an 'insured contract.'

State Auto's argument that this employer's liability exclusion applies to Clark or Gilbane is meritless. While plaintiff may have been working on behalf of the Trend entities, and the Trend entities in turn were working on behalf of Clark and Gilbane, there has been no evidence that plaintiff was actually an employee of Clark or Gilbane. Section V of form CG 00 01 12 04, defines "employee" to "include[] a 'leased worker,'" and "leased worker" is defined as "a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business." Here, there is no evidence that plaintiff was leased to Clark or Gilbane by a leasing firm or under any such agreement. Further, it is axiomatic that clear exclusionary provisions are "strictly construed against the insurer and in favor of the insured." *Hastings Mut Ins Co*, 286 Mich App at 292. Thus, this exclusion did not apply to relieve State Auto from its duty to defend Clark and Gable.

Because Clark and Gilbane were additional insureds under State Auto's policies and the employer's liability exclusion did not apply, State Auto had a duty to defend Clark and Gilbane in this instant litigation.[8]

IV. CONCLUSION

Because there is no genuine issue of material fact regarding plaintiff's active negligence claims against Clark, Green, Shingobee, and Gilbane, defendants are entitled to summary disposition. Further, the trial court correctly concluded that State Auto had a duty to defend Gilbane and Clark. We affirm.

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly

[8] All parties concede that certificates of liability cannot create coverage where no coverage exists.